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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**MOTION IN LIMINE NO. 5: CISCO'S  
MOTION TO EXCLUDE TESTIMONY  
FROM TERRY EGER**

**REDACTED VERSION**

Judge: Hon. Beth Labson Freeman

1 **I. INTRODUCTION**

2 Cisco respectfully moves *in limine* to exclude the testimony of Mr. Terry Eger, whom  
 3 Arista has listed as a trial witness on the topics “Knowledge relevant to Arista’s estoppel, laches,  
 4 fair use and misuse defenses. Development of IOS. Cisco’s marketing and sales of its products.”  
 5 Jenkins Decl., Exh. 1. From 1988-1992, Mr. Eger was Cisco’s Vice President of Sales, but he  
 6 ended his four-year employment with Cisco almost a quarter of a century ago. Mr. Eger has no  
 7 personal knowledge of any relevant facts, as he did not help to develop Cisco’s copyrighted CLI  
 8 user interface at issue in this case, nor take any actions while at Cisco relevant to Cisco’s  
 9 protection of its intellectual property. And he has no knowledge of the Cisco products involved in  
 10 this case from his long-ago employment at Cisco. At his deposition, he disavowed any knowledge  
 11 of the development of Cisco’s copyrighted user interface, and any knowledge of Arista’s user  
 12 interface. Testimony from Mr. Eger would be irrelevant and unfairly prejudicial to Cisco, and  
 13 would pose the serious risk of misleading the jury, Fed. Rs. Evid. 401, 402 & 403. Further, this  
 14 Court has an additional basis to preclude the proposed testimony of Mr. Eger on two topics  
 15 (“Development of IOS” and “Cisco’s marketing and sales of its products”) that Arista did not  
 16 disclose until it submitted its witness list one week ago—long after the close of discovery.  
 17 Admitting such testimony would violate Fed. R. Civ. P. 26(a).

18 **II. FACTUAL BACKGROUND**

19 Mr. Eger worked for Cisco for only four years and left his position at Cisco more than  
 20 twenty-four years ago. During his deposition, Mr. Eger repeatedly denied that he had any first-  
 21 hand knowledge of any facts that are relevant to the claims or defenses of this case. Specifically,  
 22 Mr. Eger was employed by Cisco from 1988-1992, [REDACTED]

23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]  
 26 [REDACTED]  
 27 [REDACTED]  
 28 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]

6 **III. LEGAL STANDARD**

7 “Evidence which is not relevant is not admissible.” Fed. R. Evid. 402. “Although relevant,  
 8 evidence may be excluded if its probative value is substantially outweighed by the danger of  
 9 unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue  
 10 delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. “A  
 11 witness may testify to a matter only if evidence is introduced sufficient to support a finding that  
 12 the witness has personal knowledge of the matter.” Fed. R. Evid. 602.

13 **IV. MR. EGER’S UNSUBSTANTIATED OPINIONS SHOULD BE EXCLUDED**

14 Because Mr. Eger had disavowed any personal knowledge of any relevant facts in this  
 15 case, including whether Cisco and its competitors used the same CLI commands from 1988-1992,  
 16 he should not be permitted to testify. Fed. R. Evid. 602. Even if Mr. Eger’s ungrounded opinion  
 17 had any basis in personal knowledge, his opinion should still be excluded as irrelevant. Whether  
 18 Cisco and its competitors shared some CLI commands between 1988 and 1992, even if Mr. Eger  
 19 could credibly claim to have such knowledge, is irrelevant to whether the specific commands that  
 20 the Cisco is asserting in this case are protectable or infringed.

21 Moreover, Mr. Eger’s testimony as disclosed by Arista is not relevant to this case. Here,  
 22 Cisco asserts that Arista infringes the copyright-protected CLI user interface of its operating  
 23 systems, IOS and NX-OS. [REDACTED]

24 [REDACTED] Any knowledge he may have  
 25 about the development of other aspects of Cisco’s operating systems would be irrelevant to this  
 26 case. Likewise, any testimony that Mr. Eger could provide regarding “Cisco’s marketing and  
 27 sales of its products” would not be relevant. Mr. Eger’s knowledge of Cisco’s sales and marketing  
 28 is necessarily limited to his experience, which ended more than twenty-four years ago. Mr. Eger’s

1 experience as Cisco's Vice President of Sales involved completely different products and different  
2 markets than the ones at issue in this case, and Mr. Eger admitted that he did not even know which  
3 of Cisco's and Arista's product lines are relevant to this matter. *Id.* at 61:16-62:4. Having not  
4 been associated with Cisco for more than twenty-four years, Mr. Eger is too far removed from  
5 Cisco to provide any relevant information about its sales and marketing practices in the relevant  
6 time periods for this case.

7 At the very least, any potential relevance of Mr. Eger's testimony about long-outdated  
8 information purportedly gained from his time at Cisco would be substantially outweighed by  
9 prejudice to Cisco and a likelihood that his testimony would confuse and mislead the jury. In  
10 particular, Mr. Eger's generalized and speculative testimony that Cisco's "CLI commands" are the  
11 same as other competitors' has the potential to mislead the jury to think that there are similarities  
12 in the specific aspects of the CLI user interface being asserted in this case, even though Mr. Eger  
13 disavowed knowing anything about the asserted CLI commands or screen outputs. Generalized  
14 statements denigrating Cisco's products as unoriginal have the obvious potential to prejudice  
15 Cisco, while adding nothing to the jury's understanding of the exact issues of substantial  
16 similarity, with respect to the precise technologies at issue in the case.

17 **V. MR. EGER SHOULD NOT BE PERMITTED TO TESTIFY ABOUT TOPICS**  
18 **THAT WERE UNTIMELY DISCLOSED**

19 As an additional reason to exclude Mr. Eger's testimony, Arista untimely disclosed him as  
20 a witness on two of the topics now disclosed on Arista's witness list. Arista first named Mr. Eger  
21 as part of its Supplemental Initial Disclosures, served on March 10, 2016, claiming only that Mr.  
22 Eger may have knowledge of "Arista's estoppel, laches, fair use and misuse defenses." Arista  
23 supplemented its initial disclosures an additional five times between March 10 and August 1,  
24 2016, each time repeating verbatim the description of Mr. Eger's relevant knowledge. *See* Jenkins  
25 Exh. 6. Only on September 8, 2016, as part of Arista's witness list for trial, did Arista first  
26 disclose additional topics for Mr. Eger: "Development of IOS. Cisco's marketing and sales of its  
27 products." Jenkins Exh. 1. Mr. Eger should be precluded from providing testimony related to  
28 these topics as untimely disclosed.

1 Rule 26(e) of the Federal Rules of Civil Procedure requires a party to identify, without  
 2 awaiting a discovery request, each individual likely to have discoverable information including  
 3 “the subjects of that information.” Fed. R. Civ. P. 26(a). Rule 26(e)(1) provides that: “A party  
 4 who has made a disclosure . . . must supplement or correct its disclosure or response . . . in a  
 5 timely manner if the party learns that in some material respect the disclosure or response is  
 6 incomplete or incorrect, and if the additional or corrective information has not otherwise been  
 7 made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e).  
 8 As a remedy for failure to comply with Rule 26’s mandate, Rule 37(c) provides that, “[i]f a party  
 9 fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use  
 10 that information or witness to supply evidence . . . at a trial, unless the failure was substantially  
 11 justified or is harmless.” Fed. R. Civ. P. 37(c). Indeed, the Ninth Circuit has described Rule 37 as  
 12 “a self-executing, automatic sanction to provide a strong inducement for disclosure of materials.”  
 13 *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (citing Fed. R.  
 14 Civ. P. 37 advisory committee’s note (1993)) (internal quotations omitted); *Cambridge Elecs.*  
 15 *Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 321 (C.D. Cal. 2004) (noting that exclusion of  
 16 evidence for failure to timely disclose under Rule 26(e)(2) is “automatic and mandatory unless the  
 17 party can show the violation is either justified or harmless.”) (internal quotations omitted). To  
 18 overcome Rule 37(c)(1)’s automatic and mandatory exclusion of evidence, the nonmoving party  
 19 bears the burden of establishing that its failure “to disclose the required information is  
 20 substantially justified or harmless.” *See Yeti by Molly, Ltd.*, 259 F.3d at 1107.

21 [REDACTED]  
 22 [REDACTED] They had every opportunity to interview him and  
 23 disclose the subject matter of his testimony for trial at that time. Instead, Arista disclosed only a  
 24 subset of the topics on which it wanted Mr. Eger to testify and waited until long after the close of  
 25 discovery to disclose the full scope of his trial testimony. Allowing Mr. Eger to testify about these  
 26 additional topics would prejudice Cisco, as Cisco was unable to depose Mr. Eger to determine  
 27 what he knows about these additional topics. To the extent Cisco asked him about subject matter  
 28 that could possibly relate to these topics, he repeatedly lacked any relevant knowledge, as  
 explained above.

1  
2 Dated: September 16, 2016

Respectfully submitted,

3 /s/ John M. Neukom

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